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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Original, No. 32

COMMONWEALTH OF VIRGINIA

vs.

STATE OF WEST VIRGINIA.

BRIEF ON BEHALF OF THE BONDHOLDING CREDITORS OF VIRGINIA TO REPLY TO PART III OF BRIEF FOR DEFENDANT.

HOLMES CONRAD,
Counsel for the Bondholding Creditors of Virginia.

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Part III of defendant's brief was not filed until after the close of the argument at the bar, and leave was allowed to reply thereto.

For brevity sake I will refer to it hereafter as Senator Spooner's brief.

Taking up his points in the order in which they are presented in his brief the first one is:

> "This court has never decided that it is a settled rule of public law that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them."

It is not altogether apparent whether the Senator intends to lay stress on the word "decided," and thereby imply that the declaration made by Justice Field, in Hartman *vs.* Greenhow, was merely *obiter dictum,* or whether he means to assert that the rule as stated by Justice Field is not in accordance with the statement of the rule as usually made by writers on public or international law and by other accepted authorities.

If he means that the declaration of Justice Field was not pertinent and material to the judgment of the court, whose opinion and judgment he was announcing, a brief reference to the case will determine that.

In Hartman *vs.* Greenhow, 102 U. S., on page 674, it is said:

> "The principal question for determination, as thus seen, is the validity of the statute of the State requiring the tax levied upon its bonds to be deducted from the coupons for interest, originally attached to them, when the coupons are presented for payment, so far as it applies to coupons separated from the bonds and held by different persons.
>
> "To fully understand this question, it will be necessary to make a brief reference to the legislation of the State upon her indebtedness."

And then, after discussing a question of jurisdiction that lay in the way, the opinion proceeds (on page 676):

> "We proceed, therefore, to consider the legislation of the State upon her indebtedness. A brief sketch of it will perhaps enable us better than in any other way to exhibit the question for our determination, and indicate the solution it should receive."

So it is manifest that a consideration of all the legislation of the State upon her indebtedness was recognized as essential to a proper determination of the matter in hand.

The holder of the coupon for interest presented it to the

tax collector in payment of taxes due by him, and the tax collector declined to receive it.

If the holder had a right to insist that his coupon should be received in payment of his taxes, that right accrued to him only under the act of March 30, 1871, known as the "Funding Act."

By that act the State had undertaken to apportion her public debt into two parts. One part, amounting to two-thirds of the entire debt, was estimated to be the proper share to be borne by Virginia, and for this amount Virginia gave to the original bondholder her new bond with six per cent interest, evidenced by the coupons attached to the new bond, and provided that these coupons should be received by the State in payment of any taxes or dues to the State, and this was written on the face of the coupon.

The other part of the debt, amounting to the remaining one-third, was estimated to be the proper share to be borne by West Virginia as her just or equitable share of the public debt, and for this amount the bondholder received from the State a certificate setting forth the amount of the bond not funded, with interest thereon, and that payment thereof would be provided for in accordance with such settlement as might be subsequently had between the two States, and that Virginia would hold the bond so surrendered, so far as it was not funded, in trust for the holder or his assignees.

Suppose this court in its consideration of all the statutes and the history of the case had found that in 1861 the two States had by a solemn, valid compact, made between them, agreed that West Virginia's share of this public debt should be ascertained in accordance with the plan prescribed in the ninth section of the Wheeling ordinance. It must then have held that the act of 1871, which had estimated West Virginia's share to be one-third of the whole debt, and had proceeded to make a settlement on that basis, was in violation of the obligation of the contract made between the two States in 1861, and that said act was, for that reason, void

and of no effect, and instead of reversing the judgment of the Court of Appeals of Virginia it would have affirmed it, although not on the grounds stated by the lower court.

It did, however, reverse the judgment of the Court of Appeals of Virginia, and it did so for the reasons stated by Justice Field. These reasons embraced the plan of ascertainment of West Virginia's share, in accordance with the doctrines of public or international law, as stated in the opinion of the court, and without the statement of that doctrine the decision would have been meaningless and pointless.

Hence we conclude the statement of that doctrine, in the opinion of the court, was not *obiter,* but relevant, material and essential to the decision announced.

II.

Senator Spooner's second point is thus stated:

> "It can hardly be accurately said that it is a settled rule of international law, that where a State is divided into one or more States, the debt of the parent State, retaining its personality with diminished territory and resources, is, in the absence of special agreement, to be ratably apportioned between them."

To this version of the rule we readily assent, and we do not remember to have seen the rule so stated by any writer. Indeed, one obvious objection to the rule as stated and oppugned by the Senator, is the serious difficulty that lies in the premise of "dividing a State into *one* State," and this difficulty is not removed by the alternative of "or more States." But, assuming that what is meant is "dividing a State into 'two or more States,'" and that Justice Fields' statement of the rule, in this form, is challenged, we are prepared to vindicate Justice Fields' accuracy, and to maintain that in this form his statement of the rule is supported by reason and authority.

Whether or not a rule of law exists, and what is its exact form of expression, can be ascertained only by resort to those sources of information that are usually relied on as authoritative and controlling.

Senator Spooner appears to rely on Captain Edwin F. Glenn, U. S. A., as one of such sources, who, in his "Handbook of International Law," does indeed state, as his view, that

> "Treaties of alliance, of guaranty, or of commerce, are not binding upon the new State, nor is it liable for the general debt of the parent State."

This statement, so far as it embraces treaties of alliance, of guaranty, or of commerce, is to be found in all the writers; the additon, "Nor is it liable for the general debt of the parent State," is Captain Glenn's own original discovery. He cites as his authority Hall's Int. Law, 96-97, and he also cites Kent Comm., 25, where this addition does not appear; but he accounts for its non-appearance by the comment on Chancellor Kent's version of the rule that "this is true in the one case of the State so splitting up into parts as to completely lose its identity," which, he intimates, was overlooked by Chancellor Kent.

With Captain Hall's work, as the result of the lucubrations of a young army officer emulous of the fame of General Halleck, we are disposed to be liberal; but, for all practical purposes, we are inclined to prefer as our guide that "Digest of International Law of the United States, Taken from Documents Issued by Presidents, and Secretaries of State, and from Decisions of Federal Courts, and Opinions of Attorneys General, Edited by Francis Wharton, in Three Volumes, Washington, Government Printing Office, 1886," where, in volume 1, page 19, the rule is thus stated:

> "In the event of a State being divided into two or more independent sovereignties, the obligations which had accrued to the whole before the division

> are ratably binding on the different parts; for, as Story says, 'The division of an empire creates no forfeiture of previously vested rights of property.' And so, *eo converso*, where several separate States are incorporated into one sovereignty, the rights and obligations that belonged to each before the union are binding upon the new State; but, as General Halleck points out, of course the rule must be modified to suit the nature of the union formed and the characters of the act of incorporation in each particular case."

And again quoting from authorities it is said:

> "In the separation and rearrangement of nations in Europe, special provisions are usually made for the payment of public debts; and the principle seems admitted that, in case of a division of a State, each new State is bound for the whole debt contracted by the former; and in case of a union of States, it seems equally clear that as the whole must defend the part in war, which is the international process of attachment it must practically pay the debt, although the foreign power may look only to the people and land of the State which made the contract. The formation of the new States so alters the nature of all securities the creditor looked to, that the new State has a general obligation to see that he does not suffer by the change."
>
> *Ibid.*, p. 22.

We may be excused from following with acute nicety the views of Mr. Hall and the other English and Continental writers so profusely quoted by Senator Spooner when we find those of Wheaton, Kent, Halleck, and other American writers adopted by the Secretary of State, the Attorneys-General of the United States, and the Federal courts, so admirably compiled, arranged and digested by Dr. Francis Wharton, and found to be so entirely in accord.

A clever review of this work of Dr. Wharton appeared in the *Edinburgh Review*, and was reprinted in the *Littell's Living Age* for August 27, 1887. The reviewer said:

"So that whilst the book contains definite propositions of international law and conduct, as laid down by American judges and statesmen, and, in this sense is essentially a digest of international law, it is at the same time, a collection of public documents and extracts of the highest historical value. But at present we are wholly without such a work as that before us, and the student of international law in this country, has only the ponderous and comprehensive work of Sir Robert Phillimore, or the more concise and elementary work by Mr. Hall, together with other works of a similar character, or monographs on some special subject."

From which we may infer that Dr. Wharton's digest is regarded even in Great Britain as the best work on the subject of international law.

Mr. Hannis Taylor is referred to by Senator Spooner as an author "quoted in the brief of counsel for the bondholding creditors." It is hardly noteworthy, but it would have been perhaps more accurate to have said "quoted in the brief of counsel for West Virginia, and commented on in the brief of counsel for the bondholding creditors," because the only ground that counsel for the creditors had for referring to Mr. Taylor was to show that he appeared to have been misapprehended by the counsel for West Virginia (*Vide* my brief, page 21).

It is apparent from the copious quotations from Mr. Hall's work, to be found in the brief of Senator Spooner, that we may do Captain Glenn an injustice in imputing to him the "discovery" of the view by which the text of Chancellor Kent is sought to be amended, for we find on page 14 of the Senator's brief the exact language used by Captain Glenn employed by Mr. Hall.

And it is but just to Mr. Hall to point out that he does concede all that is said by Kent, Wharton, and the other writers in the paragraph quoted on page 15 of the Senator's brief, as follows:

> "No doubt the debt of a State from which another separates itself ought, generally to be divided between the two proportionately to their respective resources, as a matter of justice to the creditors, because it is seldom that the value of their security is not affected by the diminution of the State indebted to them. *But the obligation is a moral, not a legal one.*"

We may not linger long over the distinction between the "moral" and the legal sanctions of international law. Captain Glenn's definition will suffice us for the present:

> "Public international law consists in certain rules of conduct which modern civilized nations regard as binding on them in their relations with one another and enforceable by appropriate means in case of infringement."

III.

Senator Spooner's third point is that the public debt of Virginia as of January 1, 1861, was "inherently a *special*, and not a *general* debt."

He insists on page 32 of his brief:

> "And this distinction between a *general* and a special or local debt is a substantial one. It rests upon sound principles, and is essentially just. Obviously, there is no such distinction when we consider the relation of a State and its creditor. There the purpose for which the loan was effected is immaterial; but in respect of the apportionment of the debt of a State between itself and a new State erected out of its territory, the distinction is not only apparent but important."

He further defines:

> "A general debt, using the phrase as the publicists use it, with reference to debt succession, one would say is a debt, the object and result of which inures to the benefit of all the people subject to the dominion

> of the State, the expeditures of which are not susceptible of localization, and which cannot be said to benefit one section more than another, or one class of citizens more than another.
>
> "Such a debt is not, in its nature, apportionable except by special agreement or ratably upon some basis recognized by international law."

We might rest our case upon the exception here stated on the ground that the public debt of Virginia is apportionable between Virginia and West Virginia on "some basis recognized by international law," and that basis is the one stated by Justice Field in Hartman *vs.* Greenhow.

But can it be contended that the public debt of Virginia, as it existed on the first of January, 1861, was a *special or local debt,* as distinguished from a *general debt?*

We have seen that this debt originated from the report of a commission, of which Chief Justice Marshall was the chairman and made the report. That it originated in the execution of a broad, general, comprehensive plan of public internal improvements, designed to benefit the entire State as a unit in interest, and embraced a system of works, such as railroads, canals, turnpikes, bridges, &c., &c., extending throughout the State from the east toward the west. That these works usually began in their construction in the eastern parts of the State for the manifest reason that the material to be used in their construction could be supplied only from the eastern parts—from tide water and through the navigable rivers emptying into the ocean.

Some of these works had been completely constructed at the outbreak of the war, conspicuously the great Northwestern turnpike, extending from Winchester, in the Shenandoah Valley, to the Ohio River, and the turnpike extending from Staunton to the Ohio River. These were the two great lines of trade and travel extending through the present State of West Virginia and connecting with the lines of railway to the coast.

Surely these great works of internal improvement were in no sense "local" or "special." They were as general in their usefulness and their advantage to the entire State and to its population as the atmosphere that covered them.

In Æsop's fable of the Belly and the Members it was objected by all the other organs that the belly was the sole receptable of all the food procured by the efforts of the other members—that in modern phrase the belly was the recipient of "local" and "special" favors—but the reply of the belly was conclusive, and has been accepted in all the ages as adequate and complete.

It has been argued here that inasmuch as the proceeds of the bonds that constitute and evidence the public debt of Virginia were expended in the eastern parts that those parts alone should be required to pay them.

The fact as stated is not true, as appears from the schedules annexed to paragraph 1 of page 30 of the master's report. But suppose the fact was as is stated, would it justify the conclusion claimed?

Suppose these works had been begun on the Ohio River and extended eastwardly through the Alleghanies toward tide water and their construction had been arrested by the war, and that country was disfigured as is eastern Virginia by the unfinished remains of these arrested works, would the claim be tolerated for a moment that West Virginia should now be required to pay the entire debt because all the money had been expended within her limits?

As well might it be claimed that the receiving end of a pipe line, extending through hundreds of miles, should alone be charged with the cost of all the oil and gas placed in it, although that oil and gas was thus distributed through a thousand square miles, bringing light and warmth to thousands of homes.

If a State, in the exercise of its lawful powers, expends a sum of money in one county, and for the benefit of that county and its inhabitants alone, that may be said to be a

local or special debt, and, in case of a partition of the State, that county, or at most that part of the State within which, on the partition, that county falls, should alone be required to pay that debt, but where a State expenditure, although made in one locality only, enures to the benefit of the whole State, or was intended to do so, such expenditure, if it forms part of the public debt, should be borne by the entire State, and not by the part in which it was made.

On page 33 of his brief Senator Spooner supposes the case of the expenditure of $10,000,000 within the limits of the present State of West Virginia *for the benefit of its people,* and that thereafter the State of West Virginia was formed and admitted into the Union with no provision as to the apportionment of this debt, and he asks, "Can there be any doubt, upon principles of international law and of common justice, that the new State should take that entire debt upon its shoulders?" We reply that there can be none. But note, that is because the expenditure was made, not for the benefit of the whole State of Virginia, but only for the benefit of the people of the proposed new State of West Virginia.

But let the supposition be made more in accordance with the facts of this case as charged in the bill and admitted in the answer.

Here all the people of the old State of Virginia were represented in the legislature by their delegates and senators. Those from the western parts urge the creation of a public debt, the proceeds of which shall be applied to the construction of works of internal improvement, whereby a closer and more profitable union between the eastern and the western parts may be effected.

The eastern delegates and senators oppose this, but the western combine with the Piedmont and Valley delegates and senators and carry it through the legislature. The public debt is contracted, and the internal improvements are begun. The war arrests their further construction by the old

State. West Virginia is erected into a new and independent State, and then these works are, by private enterprise, completed in accordance with the original plan. Who now shall bear the burden of the debt contracted? It was contracted for the benefit of the whole people and State, but was constructed only within the territory of the old State. It is charged in the bill, and is not denied—indeed is admitted in the answer—that the western delegates and senators, by their votes, had effected the creation of the debt. Can there be any diversity of opinion as to what equity, good conscience and the principles of public law would dictate? The James River and Kanawha Canal would have proved of great value to the territory now forming West Virginia, but today it is useless and abandoned.

Senator Spooner, on page 35 of his brief, refers to four companies, and even states the fact that they were projected at an early date, 1816. But he fails to note that this was nearly eight years before any part of the public debt of Virginia was created.

Senator Spooner's fourth and last point which we shall notice is that the ninth section of the Wheeling ordinance and the eighth section of the eighth article of the West Virginia Constitution, taken together, form a compact, a special agreement between the two States.

IV.

I have endeavored to show in my former brief, filed in October last, that this alleged contract had no existence in fact, because—

1. The ninth section of the Wheeling ordinance formed no valid feature or term in an ordinance the sole object of which was to provide for the creation of a new State out of part of the territory of Virginia. The convention that framed that ordinance had no power to prescribe to the new

State the plan or method by which she should ascertain the amount of her share of the old public debt of Virginia.

That was altogether a matter of internal and domestic concern, which fell within the exclusive power and control of the new State.

2. The constitution framed by the people of West Virginia made another and different provision for ascertaining that amount, and this constitution altogether superseded and supplanted the provision of the ordinance, just as the constitution of Kentucky superseded the provision of the northwest ordinance of 1787 as to slavery.

Strader *vs.* Graham, 10 Howard, 82.
Scott *vs.* Sanford, 19 Howard, 393.

3. The ninth section of the ordinance was never recognized by any subsequent convention or legislature of either State, and was ignored by the convention that framed the constitution of the State.

4. It was not recognized by Congress in the debates or proceedings had on the admission of the State into the Union, and when enquiry was made in both the Senate and the House of Representatives as to the provision made for the payment of West Virginia's share of the public debt the reply was uniformally made that adequate provision was made in the constitution under which the State was seeking admission.

5. When Virginia, by the act of her legislature, consented to the creation of the new State she did so in express and significant terms, only under the provisions of her constitution.

6. The only ground on which in the proceedings had in this case such alleged compact or agreement was sought to

be maintained was that the State of Virginia had offered the ninth section of the ordinance as a proposition to West Virginia, and that West Virginia had accepted that proposition when she framed her constitution. But, as we have shown, the acceptance was a wide departure, both in form and substance, from the proposition, and hence was a rejection of it.

On page 61 of his brief Senator Spooner says: "The question is, What was intended by the framers of the ordinance?"

What the framers of the ordinance intended is immaterial. What was intended by those to whom the ninth section of the ordinance was offered as a proposition for their acceptance? What was intended by the Congress that admitted West Virginia into the Union under her constitution? What was intended by Virginia in her legislative consent to the erection of this new State within her territory?

On page 49 of his brief the Senator insists that the ninth section of the ordinance was claimed in the bill, in paragraph 18, to be one of the grounds on which Virginia asked relief in this case. An examination of that paragraph will refute this notion. That paragraph charged several instances in which West Virginia had fully recognized and admitted her liability for a proportion of the public debt. One of these was in this ninth section, where "a just proportion of the public debt shall be taken upon herself" and another, and immediately following, is the provision in her constitution where she says the new State shall assume an equitable proportion of the public lebt. Nowhere is the plan of ascertainment proposed by the ninth section recognized by Virginia except in the identification of the section as the one that proposed that plan.

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